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IN THE

Supreme Court of the United States

October Term, 1941.

No. 1020

HELEN VAN ZILE ANTHONY, WILLIAM D. SMITH and JESSE VAN ZILE ANTHONY as Executor of the will of Fannie J. Anthony,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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March 13, 1942.

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The claim that a question arising under the federal constitution is presented in this case apparently never entered counsel's mind until after the case had been tried and decided by the trial court and the decree affirmed by the Appellate Division and by the Court of Appeals. Then counsel moved for reargument in the Court of Appeals (289) and for the first time there appeared in this record any mention of the federal constitution.

The only constitutional claim that found expression throughout the course of the trial and the successive appeals was that in some way petitioner had been deprived of the trial by jury which he was seeking in another ac-

tion—the "Supreme Court action" so frequently referred to in the petition. Even had trial by jury been involved in the present case, its denial in a judicial proceeding in a state court would have presented no question under the federal constitution, which says nothing about jury trials in actions or proceedings in the state courts.

As to any important (or unimportant) federal question decided in a way probably not in accord with applicable decisions of this court, the petition leaves us in the dark. Of the two "Questions Presented" (Petition, p. 3), surely the second question (bottom of p. 3), so far as one can find a distinct question formulated in its diffuse verbiage, presents no federal issue. It merely reflects counsel's dissatisfaction with the court's decision. The first question is a confused jumble of imaginings. The court did not try, or purport to try, the issues in another action. It tried the issues in the proceeding before it (4-14). What troubles counsel is that the trial and determination of those issues destroyed some of the contentions one of the petitioners was making in another suit. This is not an uncommon incident of a trial and judgment, and its occurrence in no way offends the due process clause of the fourteenth amendment, nor until the motion for reargument in the state court of last resort had it ever been suggested that the federal constitution was in any way involved.

The petition and brief run to nearly fifty pages, yet we fear that even after their prolix presentation this court will have some difficulty in finding what this case is all about. What really happened is as follows:

Helen V. Z. Anthony, one of the petitioners, was remainderman under a testamentary trust which fell in on October 13, 1935 (18). Some months afterwards, the trustee (respondent on this application) presented to her its account of its proceedings (5, 6) with a requested instrument of accounting and release, and after keeping it for

five or six months, during which period she employed counsel, she executed and delivered a release accepting and approving the account (6). Some two years and a half thereafter, another of the petitioners, one William D. Smith, began an action against the trustee (20) alleging that in regard to one particular asset of the trust estate—a mortgage participation which because of its nature could not be completely disposed of until the liquidation of the entire mortgage—the trustee had *converted* it (229), and in his complaint he went into the whole history of the investment both before and after the release (223-230). The alleged "conversion" consisted in a reduction of the mortgage interest rate, made after the release, the participation being one of $10,000 in a $110,000 mortgage (229). In his complaint Smith alleged that he held an assignment from Helen V. Z. Anthony of the cause of action alleged in the complaint (230). Miss Anthony was quite evidently repudiating her release, although Smith's allegation of conversion, constituting part, but not all, of his "cause of action" alleged to have been acquired on assignment, was laid as of a time subsequent to the release.

How many more persons might turn up claiming to be assignees of causes of action relating to the trust estate respondent could not know. It accordingly promptly brought a proceeding in the Surrogate's Court, the tribunal in which the accounts of testamentary trustees are normally heard and settled, praying that the validity of its release be determined, and, as to the period falling without the term covered by the release, for the judicial settlement of its account, or for the whole period if the release itself were not effective (15-24).

This proceeding came duly on for trial, for which the customary notice of trial was given (271). Notices to produce specified documents on the trial were served by both sides (271, 272). Petitioners had interposed an answer contending that Smith's suit involving one item of the

account was a bar to the accounting proceeding (71, 77), and petitioners urged this defense at the outset of the hearing (86). It was overruled and the trial proceeded, petitioners not having raised any other issue in their answer, and it is the decree rendered by the Surrogate's Court, approving and settling the trustee's account and finding the release in all respects valid, affirmed by the Appellate Division and by the Court of Appeals, of which petitioners here seek review. It should be noted that as to all matters occurring after the final delivery of the release the Surrogate's Court held that its jurisdiction did not extend, and the decree leaves undetermined, so far as that proceeding is concerned, everything occurring after that date (14). Petitioner Smith still has his "conversion action" for whatever it may be worth, for among the things thus left undecided is the alleged conversion claimed to have been wrought by the reduction of the interest. The case whereof certiorari is sought was thus an ordinary judicial proceeding, wherein all the present petitioners were brought in by service of process or voluntary appearance, where they all joined in an answer, received and served notice of trial and where the case proceeded to trial and judgment.

Of such a judicial determination, how may it be contended that any one was deprived of the due process of law guaranteed by the United States constitution? As we have said, such an idea was never voiced by counsel until judgment had been rendered and affirmed by the intermediate court and the court of last resort.

Petitioners' real grievance is that they think the case was decided the wrong way. They contend that the trial court should have held that because in his own "conversion" action one of the petitioners, Smith, claiming to be an assignee of a cause of action affecting a single item in the account, had made certain allegations relating to the trust administration, therefore no court should presume

to entertain a proceeding for the judicial settlement of the trustee's account until Smith's action had been disposed of.

Because the trial court and both the appellate courts disagreed with petitioners and held that the pendency elsewhere of such "conversion" action by a single party in respect to a single item did not divest the court of jurisdiction, the petitioners now claim that due process of law has been denied them.

The determination of that question was asked of the trial court. It was explicitly within the issues. Petitioners had categorically raised it in their answer.

As a matter of law the decision was right (*Nat. Fire Ins. Co.* v. *Hughes,* 189 N. Y. 84; and the Surrogate's opinion itself, *Matter of James,* 173 Misc. (N. Y.) 1042). As the trial court said (265-266; reported in *Matter of James,* 173 Misc. (N. Y.) 1042, 1044-5)):

> "Apparently the plaintiff assumes that she is entitled as a right to a trial of the action by a jury. It would be a novel but disastrous departure if beneficiaries could bring separate actions at law for damages based upon alleged acts of negligence or other basis of surcharge against a fiduciary. Under the system of concentration of the disposition of all questions involved in the fiduciary's conduct, in an accounting or other appropriate proceeding in the Surrogate's Court or on the equity side of the Supreme Court, all such questions are determined with all of the parties before the court in an expeditious manner. The development of the jurisdiction of Chancery over accountings grew out of the dissatisfaction and delay resulting from the common-law action of account where the entire action was broken up into a series of separate trials and after the verdict in each trial the result was certified back to the auditor appointed to examine the account (*Matter of Beare,* 122 Misc. 519; aff'd 214 App. Div. 723). Delay and expense thereby resulted. That system long ago fell into disuse both in England and in this State. It was supplanted by the more effectual and speedy remedy under the concentrated

jurisdiction of a court of equity (*Malone* v. *Saints Peter & Paul's Church*, 172 N. Y. 269, 276; *Matter of Raymond* v. *Davis*, 248 id. 67, 72)."

But even had it been wrong, it was a decision rendered on an issue specifically raised, in a proceeding whereof the court had jurisdiction of all the parties and all the present petitioners appeared and participated in the trial. After hearing them the court held that the ~~finding~~ PENDENCY of Smith's action was no bar to the accounting proceeding. The conception of denial of the due process of law guaranteed by the United States constitution seems never to have entered counsel's mind till after the affirmance.

The record reveals no error; least of all does it reveal lack of due process of law.

The application for certiorari should be denied.

March 13, 1942.

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